STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2013
v	No. 310647 Oakland Circuit Court
STEVEN EDWIN WOODWARD, Defendant-Appellant.	LC No. 2011-238688-FH

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury-based convictions for resisting or obstructing a police officer, MCL 750.81d(1), and domestic violence, MCL 750.81(2). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 242 days in jail for the resisting or obstructing a police officer conviction, and 93 days in jail for the domestic violence conviction. We affirm.

Defendant first argues that the trial court committed error requiring reversal when it abused its discretion in denying defendant's challenge of a juror for cause. We disagree.

This Court reviews a trial court's decision to remove a juror under the abuse of discretion standard. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). Defendant contends that the trial judge abused his discretion by failing to allow defense counsel to remove a prospective juror from the jury panel for cause. During voir dire, the prospective juror stated that she was currently employed by the Oakland County Prosecutor's Office and knew the prosecutor in this case through their mutual employment. The juror stated, however, that she could be fair and impartial in her role on the jury. Both the prosecutor and the defense attorney challenged the juror for cause under MCR 2.511(D)(9), but the judge denied both challenges, finding that the juror had no personal knowledge or affiliation with the case. Defense counsel later exercised a peremptory challenge to excuse the juror.

A criminal defendant has a constitutional right to a fair and impartial jury. US Const, Am VI; Const 1963, art 1, §20. As part of this right to a fair and impartial jury, both parties are allowed to challenge jurors for cause. MCR 2.511(D). In pertinent part, MCR 2.511(D)(9) provides:

It is grounds for a challenge for cause that the person:

* * *

> (9) is the guardian, conservator, ward, landlord, tenant, employer, employee, partner, or client of a party or attorney . . . .

Generally, it is within the trial court's discretion whether to remove a juror for cause. *People v Eccles*, 260 Mich App 379, 382-383; 677 NW2d 76 (2004). However, once a party shows that a prospective juror falls within one of the enumerated categories of MCR 2.511(D), the trial court is without discretion to retain that juror and must excuse the juror for cause. *Id.* at 383.

In determining whether an error in refusing a challenge for cause merits reversal, a four-part test is employed. *People v Lee*, 212 Mich App 228, 248; 537 NW2d 233 (1995). There must be a clear and independent showing on the record that: (1) the trial judge improperly denied the challenge for cause; (2) the aggrieved party exhausted all of their peremptory challenges; (3) the aggrieved party demonstrated the desire to excuse another subsequently summoned juror; and (4) the juror whom the aggrieved party later wished to excuse was objectionable. *Id.* at 248-249.

The trial judge's denial of defendant's for-cause challenge of the prospective juror did not amount to error requiring reversal, because defendant did not make a clear and independent showing on the record that all four elements of the *Lee* test were met. As to the first element, this Court assumes, without deciding, that the prospective juror, as an active Oakland County Assistant Prosecutor, would meet the definition of "employee, [or] partner . . . of a party or attorney," thereby meeting the first element of *Lee*. See MCR 2.511(D)(9).[1] Further, defense counsel did exhaust all of his allotted peremptory challenges during voir dire. Thus, defendant met the second element of *Lee*.

However, defendant did not meet the third and fourth elements of the *Lee* test. The third requirement of *Lee* is that the aggrieved party demonstrates the desire to excuse another subsequently summoned juror. *Lee*, 212 Mich App at 249. In this case, defense counsel exercised his fifth and final peremptory challenge near the very end of voir dire. After defense counsel exercised this last peremptory challenge, only one additional prospective juror underwent questioning. Defense counsel never stated on the record that he wished to use a peremptory challenge on this last juror and thanked her when she stated that she was not biased and would do her best to listen to the evidence and determine the credibility of all the witnesses. Because there was only one "subsequently summoned juror," *id.*, and because defense counsel did not make a clear and independent showing on the record that he wished to excuse her, the third element of *Lee* was not met.

Additionally, defendant cannot show that the last juror was "objectionable." *Id.* She was questioned by defense counsel and she stated unequivocally that she understood defendant was

[1] This Court has not yet formally addressed this question. Because our analysis below makes the determination of whether a prosecutor falls within MCR 2.511(D)(9) superfluous, we refrain from deciding the issue.

innocent until proven guilty and that she was not biased for either side. Therefore, defendant cannot show that this subsequently summoned juror was objectionable and fails to meet the fourth element of *Lee*.

Defendant next argues that the trial judge abused his discretion in denying defendant's motion for mistrial. Again, we disagree.

"This Court reviews for an abuse of discretion a trial court's ruling whether to grant a mistrial." *People v Waclawski*, 286 Mich App 634, 708; 780 NW2d 321 (2009). Defendant contends that the trial judge abused his discretion by failing to grant a mistrial after a prosecution witness mentioned that defendant had just finished serving a long prison sentence, and that was why defendant refused to stop despite hearing the officers' commands. During trial, the prosecutor called one of the investigating detectives to the stand. On direct examination, the prosecutor asked the detective about a conversation he had with defendant while defendant was in the hospital after the accident with the police cruiser. During questioning, the following exchange occurred:

> *Q.* Did you ask him about him knowing that the officer would have been talking --
>
> *A.* Yes, he said he --
>
> *Q.* -- at that point?
>
> *A.* He indicated very clearly he knew the officer wanted to talk to him but he doesn't like police officers. He just got out of jail after 15 years and wants nothing to do with police.

Defendant argued that the detective's statement violated a pretrial court order stating that "Counsel for the People will not make statements to the jury regarding Defendant being arrested or charged with any crime in case in chief unless court finds door has been opened." The trial judge denied defendant's motion for mistrial, finding that the pretrial order only barred the prosecutor from making any reference to defendant's criminal past, not witnesses, and the probative value of the statement was not substantially outweighed by the danger of unfair prejudice.

"A mistrial is warranted only when an error or irregularity in the proceedings prejudices the defendant and impairs his ability to get a fair trial." *Waclawski*, 286 Mich App at 708. It is the duty of the trial judge to control all trial proceedings and limit the introduction of evidence only to relevant and material matters. MCL 768.29. MRE 403 states, in pertinent part, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Evidence of a prior conviction may be prejudicial to the accused, but not every mention before a jury of some inappropriate subject matter will warrant a mistrial. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), overruled in part on other grounds, *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007).

The trial judge did not abuse his discretion in denying defendant's motion for mistrial. First, it was not an abuse of discretion to find that the prosecution complied with the court order.

The express prohibition within the court order kept "*Counsel* for the People" from mentioning defendant's criminal background. The trial judge's determination that an unresponsive statement from a prosecution witness mentioning defendant's prior time in prison was not a statement by the prosecution falls well within the principled range of outcomes, and as such, is not an abuse of discretion.

Second, the trial judge did not abuse his discretion in finding that the probative value of the detective's statement was not significantly outweighed by the danger of prejudice. An individual can be found guilty of resisting and obstructing a police officer if he "obstructs . . . a person who the individual knows or has reason to know is performing his or her duties." MCL 750.81d(1). "Obstruct" includes the "knowing failure to comply with a lawful command." MCL 750.81d(7)(a). At trial, defense counsel attempted to elicit testimony on numerous occasions that defendant never saw the police officers or heard the police order him to stop. In light of defendant's theory at trial, evidence regarding defendant's motive for failing to comply with a lawful order from the police would be highly probative to the charge of resisting and obstructing a police officer. Therefore, it was within the range of principled outcomes for the trial judge to determine that the probative value of the detective's statement was not substantially outweighed by its danger of prejudice.

Further, even if the detective's statement was inadmissible, the trial judge still would not have abused his discretion in denying defendant's motion for mistrial. Not every mention before the jury of some inappropriate subject matter will warrant a mistrial. *Griffin*, 235 Mich App at 36. Unresponsive and volunteered testimony to a proper question does not impair a defendant's ability to get a fair trial. *Waclawski*, 286 Mich App at 710.

In *Waclawski*, a prosecutor elicited testimony from a detective regarding the results of a search and seizure. *Id.* at 708-709. In addition to finding compact discs containing possible child pornography, the detective testified, following a question about other evidence uncovered in that case, that he found a small amount of suspected marijuana. *Id.* at 709. The defendant immediately asked to have the jury leave the room and moved for a mistrial, which the trial court denied. *Id.* This Court held that although the testimony went beyond the scope of the prosecutor's questioning, it was an isolated comment that was never explored further. *Id.* This Court reasoned that not every mention of some inappropriate subject matter merits a mistrial and that an unresponsive, volunteered answer to a proper question is not grounds for a mistrial. *Id.* at 710.

The case at hand is analogous to *Waclawski*. The detective's statement was fleeting and in response to a proper question from the prosecutor. The question from the prosecutor was likely intended to elicit a response that would rebuke defendant's contention that he never saw the officers and never heard a lawful command to ignore. Further, the statement was not referenced again by the prosecution. A fleeting, inappropriate response to this proper question is not sufficient for granting a mistrial, and the trial judge's denial of the motion for mistrial in this case was well within the range of principled outcomes. Therefore, the trial judge did not abuse his discretion in denying defendant's motion for mistrial.

In conclusion, the trial judge's denial of defendant's motion to remove an active prosecutor from a pool of prospective jurors for cause was not an error that merited reversal

when defendant did not show on the record the desire to use peremptory challenges on subsequent jurors or that the subsequent jurors were objectionable. Further, the trial judge did not abuse his discretion in denying defendant's motion for mistrial, based upon the fleeting mention of defendant's prior criminal record.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Michael J. Kelly